



IN THE
Supreme Court of the United States

October Term, 1978.

No. 78-1767

**WILMINGTON TRUST COMPANY,
as Successor Indenture Trustee,**

Petitioner,

v.

**PENN CENTRAL TRANSPORTATION COMPANY,
as Debtor,**

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

**REPLY BRIEF OF WILMINGTON TRUST COMPANY
SUBMITTED IN SUPPORT OF ITS PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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Dated: July 10, 1979.

INDEX TO BRIEF.

	Page
STATEMENT	2
THE PLAN OF REORGANIZATION	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

TABLE OF AUTHORITIES.

Cases:	Page
Case v. Los Angeles Lumber Products Co., 308 U. S. 106 (1939)	2, 7
West v. Caterpillar Tractor Co., Inc., 547 F. 2d 885 (5th Cir. 1977)	6
 Statutes:	
Bankruptcy Act, § 77	7
Bankruptcy Code:	
11 U. S. C. § 1129(a)(7)	7
11 U. S. C. § 1129(b)(1)	7
11 U. S. C. § 1173	7

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The Petitioner, Wilmington Trust Company, as successor indenture trustee under the New York Central & Hudson River Railroad Company, Michigan Central Collateral Indenture dated April 13, 1898, filed its Petition for the issuance of a Writ of Certiorari in this matter on May 25, 1979. On June 26, 1979, the Penn Central Transportation Company, Debtor, filed its Brief in opposition. This is the Reply Brief of WTC submitted in support of its Petition. Capitalized terms used herein are used as defined in WTC's Petition.

STATEMENT.

In its Brief the Debtor points to the acceptance of the Plan by the MCC Indenture bondholders, and others, as though that fact is somehow relevant to WTC's Petition (Debtor's Brief at 1-2). This Court has previously decided that where, as here, the issue is the fairness of a plan raised in the context of its approval by a reorganization court, a subsequent vote is irrelevant. *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 114-115 (1939). Thus, the mention by the Debtor of the creditor vote is irrelevant at best and misleading at worst.

THE PLAN OF REORGANIZATION.

As a trustee, WTC has sought to protect the right of its bondholders to receive a fair and equitable distribution under the Plan. The present distribution under the Plan is neither fair nor equitable, does not provide for a distribution amounting to the equitable equivalent of the rights surrendered by the MCC Indenture bondholders, and was not subjected to an informed evaluation of the reasonable range of litigation possibilities. For these reasons, WTC has attempted to secure an adjustment to or a modification of the existing Plan. This is *not* a case, as the Debtor suggests, of the present Plan as is or no plan at all (Debtor's Brief at 3). Nor is this a case where WTC is seeking more favorable treatment at the expense of other claimants, as suggested by the Debtor (Debtor's Brief at 2). The Debtor knows full well that it has represented both to the Reorganization Court and the Court of Appeals that, if ordered, sufficient securities are available to be issued to any successful appellant. One appellant has been afforded this relief.

When originally proposed, the Plan's only recognition of retained asset collateral was the A Bond-B Bond split. Because the MCC Indenture was deemed fully secured by retained assets, WTC initially challenged the Plan's failure to give full recognition to the retained asset collateral recognized by the PCTC trustees and objected to the distribution of securities which looked to the speculative Valuation Case litigation for payment. Certain creditors who were less than fully secured by retained assets objected to the PCTC trustees' retained asset calculations. The Consolidation Mortgage and New York Central R & I Mortgage objected to the failure to include the Harlem Lease properties and the Park Avenue rentals. As a result of its objection, the Consolidation Mortgage was given credit for sufficient retained assets (although not all the Harlem Lease properties) to make it 100% secured, and the New York Central R & I Mortgage received partial relief from the Court of Appeals.

Not until the Reorganization Court issued its opinion establishing a new class of super-secured creditors did the amount of retained assets in excess of 100% become relevant to the distribution a fully secured creditor would receive under the Plan, thus raising the issue of the calculations by the PCTC trustees of the available retained assets. In determining that four mortgages were entitled to super-secured status, the Reorganization Court looked to PCTC's retained asset calculations, paying particular attention to the coverage over 100%.

As a result of the Reorganization Court's creation of a new class, WTC specifically argued to the Court below that the Reorganization Court did not consider all the retained asset collateral securing the MCC Indenture and, if it had, it would have determined that the MCC Indenture qualified for super-secured treatment.

The Debtor is wrong when it states that whether a creditor receives A Bonds or is entitled to super-secured treatment gives rise to "two entirely separate concepts." (Debtor's Brief at 15). Both depend on the amount of retained asset coverage a creditor has. The only difference is that not until after the Reorganization Court opinion did the amount of retained asset coverage become significant to the distribution provided under the Plan to certain creditors who had been treated as fully secured by retained assets.

REASONS FOR GRANTING THE WRIT.

I.

The Debtor is incorrect when it states that the matter is at an end if the Court of Appeals was correct in concluding that the contentions made in WTC's petition for rehearing were not made earlier (Debtor's Brief at 10). That is only one issue raised by this Petition. Other issues relate to the failure of the Court of Appeals to consider all the assets securing the MCC Indenture, including the Harlem Lease properties, in its decision concerning the Plan's fairness, and failure to determine whether the Plan's compromises were within the range of litigation possibilities.

Significantly, the Debtor does not dispute that the MCC Indenture has a lien on the Park Avenue rentals, a lien which the MCC Indenture has asserted since the beginning of PCTC's proceedings. Concerning whether that issue was raised in the briefs to the Court of Appeals, the Debtor fails to point out that the two quotations from WTC's reply brief which specifically refer to the inclusion of the Park Avenue rentals are part of an argument titled "Value of the Michigan Central Collateral Indenture Claim is Not Recognized . . . A. The Value of the MCC Indenture for the Purposes of Determining 'Super-Secured Status'". In that argument, WTC unequivocally argues that the Park Avenue rentals and the Harlem Lease properties must be considered for the purpose of determining super-secured status and must be marshalled down to the MCC Indenture.*

* Because the MCC Indenture was fully secured for the purpose of the A Bond-B Bond split, it was not necessary for WTC to take a position concerning New York Central R & I Mortgage's claim to additional retained assets for the purpose of securing more A Bonds.

In grasping for straws, the Debtor quotes from a portion of its brief in the Court of Appeals in a weak attempt to show the MCC Indenture was not claiming the rental income from the Park Avenue properties as retained assets (Debtor's Brief at 11). That quotation does not refer to WTC, the MCC Indenture, or its bondholders. Furthermore, in context, the quotation refers to the Park Avenue rentals, not for the purpose of determining super-secured status, but for the A Bond-B Bond split. Thus, it is absurd to suggest that WTC should have specifically commented on the footnote when, in fact, WTC reasserted its claim to the Park Avenue rentals for super-secured purposes in its reply brief.

Finally, the Debtor argues that WTC should have set forth specific cross-references in its briefs. This statement belies the realities of the situation. The Debtor was well aware of WTC's position and nothing in its brief suggests the contrary. In fact, the Debtor recognized WTC's claim to the Harlem Lease properties at oral argument before the Court of Appeals (Transcript at 1-148). WTC's claim to the Park Avenue rentals was treated identically to the Harlem Lease properties in its briefs to the Court of Appeals. WTC "fairly raised by the briefs" the issue of the Park Avenue rentals. *West v. Caterpillar Tractor Co., Inc.*, 547 F. 2d 885 (5th Cir. 1977).

As the Debtor states over and over, these proceedings are indeed complex. While the obvious and injurious error committed by the Court below may be understandable under the circumstances, it must, nevertheless, be corrected.

II.

Debtor's arguments in the second portion of its brief sidesteps the matters raised in WTC's Petition. WTC

does not object to the A Bond-B Bond allocation to any of the other indentures under the Plan. WTC does object to the failure of the Court below to consider and marshall down all the collateral securing the MCC Indenture for the purpose of determining whether its bondholders are entitled to super-secured treatment. If all retained asset collateral is not considered, "super-secured" status is nothing more than a subjective determination, pulling mortgages out of a hat. Second mortgages cannot be arbitrarily excluded without a full determination of the sufficiency of retained assets after satisfaction of prior obligations and administrative claims. This analysis is mandated by decisions of this Court. *Case v. Los Angeles Lumber Products Co.*, *supra*.

III.

Almost as an afterthought, the Debtor suggests that this proceeding is not of general importance because of the repeal of Section 77 of the Bankruptcy Act. This is not the case. Objections raised by WTC are fully applicable to the new Bankruptcy Code. Under the Code, plans are subject to the same "fair and equitable" test, 11 U. S. C. § 1129(b)(1), which is applicable to railroad reorganizations, 11 U. S. C. § 1173. Further, under the Code, a secured creditor must receive a distribution which is equal to the liquidation value of his collateral, a value similar to the value reached after evaluating the reasonable range of litigation possibilities. 11 U. S. C. § 1129(a)(7). Finally, as under Section 77, the Code requires that all collateral securing a creditor's claim be recognized and considered in determining a plan's validity. All the collateral securing the MCC Indenture was not considered by the courts below. Though the statute may have changed, the principles are still the same.

CONCLUSION.

Conspicuously absent from Debtor's brief is any comment on the merits of WTC's fairness objections raised below. Those objections are supported by long-standing decisions of this Court, decisions which Debtor does not dispute. Failure of the Court below to consider and follow the decisions of this Court are ample grounds for granting this Petition.

Respectfully submitted,

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